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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted]

No. [redacted] Original.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF CALIFORNIA.

SUPPLEMENTAL BRIEF OF STATE OF CALIFORNIA IN REPLY TO AMICUS CURIAE BRIEF OF ROBERT E. LEE JORDAN.

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PAGE

INDEX.

Page

Argument

I. Minerals did not remain vested in the United States when title to submerged lands vested in the State upon its admission into the Union.... 1

1. Decisions of this Court hold that the entire fee including all mineral rights in the lands underlying navigable waters passes to the State upon its admission..... 3

2. There was no policy of Congress in 1850 to exclude minerals generally from grants to a State..... 4

3. Express reservation of "primary disposal of public lands" and condition of maintaining free navigation, contained in Act of Admission, completely negative any implied reservation of mineral rights..... 9

II. Equality..... 10

Conclusion..... 15

CITATIONS.

Cases:

Boggs v. Merced Min. Co., 14 Calif. 274..... 2
Borax Consolidated v. Los Angeles, 296 U. S. 10.... 13
Brewer-Elliott Oil Co. v. United States, 260 U. S. 77 4
Dunbar Lime Co. v. Utah-Idaho Sugar Co., 17 F. 2d 351..... 8
Hicks v. Bell, 3 Cal. 219..... 12
Knight v. United States Land Association, 142 U. S. 161..... 14
Ivanhoe Mining Co. v. Consolidated Mining Co., 102 U. S. 167..... 7
Lovelace v. Southwestern Petroleum Co., 267 Fed. 513..... 8
McDonald v. United States..... 8
Moore v. Smaw, 17 Cal. 199.....10, 12, 13
Mullan v. United States, 118 U. S. 271..... 7

	Page
Mumford v. Wardwell, 6 Wall. 423	14
Oklahoma v. Texas, 258 U. S. 574	4
Pollard v. Hagan, 3 How. 212	9, 11
San Pedro and Canon del Agua Co. v. United States, 146 U. S. 120	8
San Francisco v. Le Roy, 138 U. S. 656	14
United States v. Castillero, 67 U. S. 17	2
United States v. Chandler-Dunbar Co., 209 U. S. 447	4
United States v. Coronado Beach Co., 255 U. S. 472	14
United States v. Knight's Admrs., 67 U. S. 227	2
United States v. Mission Rock Co., 189 U. S. 391	4, 14
United States v. O'Donnell, 303 U. S. 501	14
United States v. Sweet, 245 U. S. 563	7
United States v. Utah, 283 U. S. 64	3
Webb v. American Asphaltum Mining Co., 157 Fed. 203	7
Weber v. Harbor Commissioners, 18 Wall. 57	14
Work v. Louisiana, 269 U. S. 250	5, 8

Statutes:

Act of September 9, 1850	6
Act of September 28, 1850	5
Act of March 3, 1851	13
Act of March 31, 1853	15
Act of July 22, 1854	14
Act of July 25, 1866	5

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UNITED STATES OF AMERICA, *Plaintiff*,

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STATE OF CALIFORNIA.

SUPPLEMENTAL BRIEF OF STATE OF CALIFORNIA IN REPLY TO AMICUS CURIAE BRIEF OF ROBERT E. LEE JORDAN.

Two points which are raised by the Amicus Curiae Brief of Robert E. Lee Jordan call for replies.

I.

Minerals Did Not Remain Vested in the United States When Title to Submerged Lands Vested in the State Upon Its Admission Into the Union.

Amicus Curiae Jordan asserts (Br. p. 14) that:

> "Regardless of the question as to the title to tide and submerged lands, there is a separate and distinct question as to the ownership of minerals (oil and gas) in those lands."

It is there argued by counsel that the mines were the royal property of Spain; that Mexico succeeded to the ownership of such royal mines; that in 1848 the United States succeeded to the Spanish and Mexican rights and minerals;[1] that the settled policy of Congress excludes all mineral lands from grants to States unless expressly conveyed; and counsel conclude by saying that: (Br. p. 16)

> "It therefore, appears that regardless of the question of title to tide and submerged lands, no minerals in the tide and submerged lands were ever granted to the State of California and that the minerals, which include oil and gas in the tide and submerged lands, are owned by the United States Government and such ownership should be confirmed."

Amicus Curiae is in complete error in this contention.

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[1] On this proposition counsel says that: "The United States courts have recognized the ownership of minerals by Spain and Mexico and have ruled that the United States Government succeeded to the Spanish and Mexican rights at the time the territory, out of which California was created, was ceded to the United States", and cites: *U. S.* v. *Castillero*, 67 U. S. 17; *U. S.* v. *Knight's Admrs.*, 67 U. S. 227; *Boggs* v. *Merced Min. Co.*, 14 California 274.

But the cited cases do not lend any support whatever to counsel's assertion:

(i) *United States* v. *Knight*, *supra*, involved the sole question whether or not the claimant produced sufficient proof before the Board of Land Commissioners to establish a valid Mexican grant. The Court reviewed the evidence and found that it was insufficient to establish that Mexico had made a grant to the claimant or to his predecessors. There is no single mention of minerals in the entire decision.

(ii) *United States* v. *Castillero*, *supra*, likewise involved the question of whether the claimant furnished the Board of Land Commissioners sufficient evidence to prove that he had obtained from Mexico a grant of a quicksilver mine in Santa Clara County, California, together with two square leagues adjoining the mine. The Court held that the evidence was insufficient to establish a valid grant to either the two square leagues or to the mine. The Court reviewed the Mexican law on the mode of acquiring mining rights and held that strict compliance with the Mexican law was necessary in order to obtain mining rights and that under the evidence Castillero failed to prove compliance with the laws of Mexico and hence that he had not obtained any grant of such rights.

Ownership of the beds of navigable waters, which vests in a State upon its admission, is the fee simple absolute. All interest in these beds, ipso facto, by virtue of the Constitution, is thereupon owned by the State. All minerals are included in this fee ownership. The truth of this principle is demonstrated in several ways:

1. Decisions of this Court hold that the entire fee including all mineral rights in the lands underlying navigable waters passes to the State upon its admission.

United States v. *Utah*, (1931) 283 U. S. 64 adjudicated the fee simple title in the State of Utah to the beds of all navigable portions of the Colorado River. Both the United States and the State of Utah had executed oil and gas prospecting permits and leases covering portions of the river bed in question. The Court held (page 75) that:

> "In accordance with the constitutional principle of the equality of States, the title to the beds of rivers within Utah passed to that State when it was admitted to the Union, if the rivers were then navigable; and, if they were not then navigable, the title to the river beds remained in the United States".

As to those portions of the river found to be navigable the Court decreed that the State was the owner in fee simple absolute, including the mineral rights in issue. The decree read (page 802-803) in part as follows:

> "The United States of America is forever enjoined from asserting *any estate, right, title, or interest* in and to said river bed, or any part thereof, adverse to the State of Utah, or its grantees; and from in any manner disturbing or interfering with the possession, use, and enjoyment thereof by the State of Utah, or its grantees."

The only qualification in the decree was the reservation of the paramount power of the United States to protect the navigability of these waters (p. 804).

United States v. *Mission Rock Co.* (1903) 189 U. S. 391 adjudged that the United States "take nothing" as to certain submerged lands in San Francisco Bay held by Mission Rock Company under grant from the State of California, and in which case the United States sought a judgment of ejectment, (See page 395; and also 109 Fed. 763, 772). There was no reservation of any interest whatever in the United States in the submerged lands in San Francisco Bay in this judgment.[2]

Clearly then, the fee simple, including all mineral rights, in all lands underlying navigable waters within the State's boundary passed to the State upon its admission into the Union. No interest either mineral or otherwise was reserved therefrom.

2. There was no policy of Congress in 1850 to exclude minerals generally from grants to a state.

On a completely independent ground, the contention of amicus curiae that minerals were reserved to the United States is found to be without any merit whatever. This Court has specifically held that *in 1850* there was no established policy of Congress to exclude minerals from lands granted by it to the States, in the absence of an express reservation or exclusion thereof. Rather, this Court held that in 1850 when Congress granted public lands to a State without an express reservation or exclusion of minerals, all mineral rights vested in the grantee State.

Since California was admitted into the Union on September 9, 1850, it is obvious that, as Congress had no policy in that year to exclude minerals generally from lands passing to the State, there can therefore be no possible merit in counsel's contention that there was an implied reservation

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[2] To the same effect: *United States* v. *Chandler-Dunbar Co.* (1908), 209 U. S. 447; *Oklahoma* v. *Texas* (1922), 258 U. S. 574, 585; *Brewer-Elliott Oil Co.* v. *United States* (1922), 260 U. S. 77, 83-85.

or exclusion of minerals in the Act of Admission of California, predicated on an asserted policy of Congress.[3]

In *Work* v. *Louisiana* (1925) 269 U. S. 250, 256, this Court was presented with the question of whether or not minerals passed to the State of Louisiana under an Act of Congress of September 28, 1850 granting *in praesenti* all swamp and overflowed lands within the State.[4] The Court held that this 1850 grant was effective to vest title in the State immediately—*in praesenti. The Court found that there was no policy on the part of Congress in the year 1850 generally excluding minerals from its grants to States.*

The Court concluded that, in the absence of an express exclusion of minerals, the 1850 grant vested all mineral rights in the grantee State. In a unanimous opinion, concurred in by Justices Holmes, Brandeis and Stone, this Court said, as to the non-policy of Congress, that:

> "It is urged that such a reservation should be read into the grants by reason of a settled policy of the United States of withholding mineral lands from disposal save under laws specially including them. *There was, however, no such settled policy in 1849 and 1850* when the swamp land grants were made. Prior to that time, it is true, it had been the policy in providing for the sale of

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[3] We, of course, do not intend to be understood as implying in any respect whatever that lands under navigable waters are "public lands" of the United States. We have demonstrated in our main Brief (pages 89-100) that "public lands" do not include lands under navigable waters. We are here merely showing that the basic assumption of amicus curiae is false; and that grants by Congress of public lands of the United States, made in the year 1850, have been held by this Court to convey all mineral rights, unless Congress expressly and specifically reserved or excluded minerals from such grant.

[4] Section 4 of this Act of September 28, 1850, extended the benefits of the grants to each of the other States of the Union in which such swamp and over-flowed lands were situated. California was one of the grantees of the swamp and over-flowed lands under this Act. Hence the decision in *Work* v. *Louisiana* settled the question that minerals in swamp and over-flowed lands in California vested in California on September 28, 1850—three weeks after California was admitted into the Union.

the public lands, to reserve lands containing 'lead mines' and 'salt springs'. *United States* v. *Gratiot*, 14 Pet. 526, 538; *United States* v. *Gear*, 3 How. 120, 131; and *Morton* v. *Nebraska*, 21 Wall. 660, 668. Such mines and springs appeared upon the surface of the land, and were peculiarly essential to the public needs of the early communities. *But there was, at that time, no established public policy of reserving mineral lands generally.* This is emphasized by the fact that the general Act of 1841, which gave preemption rights to settlers on the public lands, merely excepted lands 'on which are situated any *known salines or mines*.' And while the Act of September 27, 1850, providing for the disposal of public lands in the Territory of Oregon to settlers, expressly excepted 'mineral lands', it is manifest that this one local Act, approved the day before the swamp land Act of 1850, was insufficient to establish a settled public policy in reference to the reservation of mineral lands prior to the latter Act. And the fact that immediately after the subject of mineral lands had been thus brought to the attention of Congress, it did not except mineral lands from the grant of swamp lands to the several States, indicates that no reservation of such lands was intended.

"It is clear that, as there was no settled public policy in reference to the reservation of mineral lands prior to the acts of 1849 and 1850, *there is no substantial ground for reading such a reservation into the broad and unrestricted grants* of swamp and overflowed lands made to the States, *in praesenti*, by these Acts, especially since such lands were not then generally known to contain valuable minerals, and when unfit for cultivation were commonly regarded as having value only after reclamation—the purpose for which both of these grants were made—the discovery of their oil and gas having been made at a much later date."

Since there was no policy of Congress in September, 1850 excluding mineral lands or mineral rights from grants by Congress to the States, the basic premise of the argument of Amicus Curiae Jordan is destroyed. As there was no express reservation of the mineral rights or mineral lands, as such, in the Act of September 9, 1850, admitting Califor-

nia into the Union, and as there was then no policy of Congress impliedly reserving minerals, it follows conclusively that in the absence of an express reservation, all minerals vested in the State ipso facto upon the vesting in the State of title to all lands under navigable waters within the boundaries of the State.

The cases cited by Amicus Curiae Jordan in support of his claimed "policy" of Congress impliedly retaining all minerals, are found not only to involve statutes wherein minerals were expressly reserved or excluded in the Act of Congress in question,[5] but also that each of these cases was

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[5] The cases cited by Amicus Curiae in support of this proposition are:

(i) *Ivanhoe Mining Co.* v. *Consolidated Mining Co.* (1880), 102 U. S. 167. Act of March 3, 1853, granting to California Sections 16 and 36 in each township for public school purposes, there in issue, contained this express clause in Section 6 of the Act:

"excepting also, . . . the mineral lands."

The Act, in Section 12, contained the further clause that:

provided, however, that no mineral lands . . . shall be subject to such selection."

The Court said (p. 173) that by this Act of March 3, 1853:

. . . the mineral lands are excepted, in express terms, ..."

(ii) *Mullan* v. *United States* (1886), 118 U. S. 271, involved the same Act of March 3, 1853, which was involved in the *Ivanhoe* case, *supra*, and which, as shown above, expressly excepted mineral lands.

(iii) *United States* v. *Sweet* (1918), 245 U. S. 563, involved an Act of July 16, 1894, granting the State of Utah specified sections of the public lands for school purposes, which act this Court held excluded coal lands in view of the then (1894) policy of Congress, and particularly in view of the Congressional Committee Report on this 1894 bill, stating that:

"all mineral lands are exempt from any grant under the act."

This case was discussed and distinguished in *Work* v. *Louisiana*, *supra*.

(iv) *Webb* v. *American Asphaltum Mining Co.* (CCA-8, 1917), 157 Fed. 203, dealt with R. S. § 2319, which was derived from the Act of May 10, 1872, in turn derived from the Act of July 25, 1866,

distinguished as inapplicable to grants made in 1850 by this Court in *Work* v. *Louisiana, supra.*

This Court, in *Work* v. *Louisiana, supra,* considered at length the decisions of the Court cited by Amicus Curiae (the *Ivanhoe,* the *Sweet* and the *Mullan* cases[6]) saying that:

> "This conclusion is not in conflict with the later decisions relating to school lands in [Ivanhoe] *Mining Co.* v. *Consolidated Mining Co.*, 102 U. S. 167—followed in *Mullan* v. *United States,* 118 U. S. 271—and *United States* v. *Sweet,* 245 U. S. 563."

One of the cases cited by Amicus Curiae, *Dunbar Lime Co.* v. *Utah-Idaho Sugar Co.,* (CCA 8-1926) 17 F. (2d) 351, 354, distinctly recognizes that in 1850 there was no es-

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by which latter Act Congress first generally declared, in express terms, that all mineral deposits on public lands shall be open to exploration, occupation and purchase by properly qualified persons. (14 Stat. 251; 30 U. S. C. A. Section 22.)

(v) *Lovelace* v. *Southwestern Petroleum Co.* (CCA-6, 1920), 267 Fed. 513, involved a private deed to lands lying in Kentucky and hence did not raise any question as to public lands of the United States and has nothing to do with the question to which it is cited by Amicus Curiae.

(vi) *Dunbar Lime Co.* v. *Utah-Idaho Sugar Co.* (CCA-8, 1926), 17 F. (2d) 351, construed an Act of July 16, 1894, granting specified sections of public lands to the State of Utah for school purposes, being the same Act that was under consideration in *United States* v. *Sweet, supra*—and with the decision being based upon the holding in *United States* v. *Sweet.* The Circuit Court of Appeals recognized, in discussing the case *Work* v. *Louisiana, supra,* that there was no policy of Congress in the year 1850 generally reserving minerals but that such policy was only established in more recent years.

(vii) *San Pedro and Cañon del Agua Co.* v. *United States* (1892), 146 U. S. 120, dealt exclusively with the question of a fraudulent survey for the confirmation of a Mexican grant. There is no mention in the decision of any matter for which the case is cited by Amicus Curiae (Brief p. 15).

(viii) *McDonald* v. *United States* (cited in Amicus Curiae Brief p. 15, as 119 Fed. 821, 825, is an erroneous citation. We have been unable to locate this decision by independent research).

[6] See these cases discussed in Footnote 5, *supra.*

tablished policy of Congress to exclude minerals from grants to States, the Court saying that:

> ". . . the Supreme Court draws a distinction between the grants of the Swamp Land Acts of 1849-50 (Rev. St. § 2479 et seq. [Comp. St. § 4958 et seq.]), and later acts, holding that, at the time of the enactment of the Swamp Land Acts, the public *policy* of holding mineral lands for disposition only under laws specially including them *was not established*, but reaffirms the general doctrine that there has been *in more recent* years an established public policy of reserving mineral lands generally."

The conclusion is irresistible that the decisions cited by Amicus Curiae hold exactly to the contrary of the proposition for which counsel have cited them and distinctly determine that Congress did *not* have any policy in the year 1850 for excluding or reserving mineral lands from its grants to States, in the absence of an express reservation or exclusion thereof.

3. Express reservation of "primary disposal of public lands" and condition of maintaining free navigation, contained in Act of Admission, completely negative any implied reservation of mineral rights.

Had Congress intended to reserve the minerals in lands beneath navigable waters,[7] it would have done so by express exclusion or reservation. That it did not intend impliedly to reserve or exclude such minerals in the Act of Admission of California, is shown beyond a demonstration by the express reservation of the "primary disposal of the public lands" and by the express condition that California maintain free navigation in all navigable waters. This express reservation and this express condition prove that

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[7] We pass over the question of whether or not Congress had the power to reserve mineral rights in lands beneath navigable waters, in view of the Constitutional requirement of equality. See *Pollard v. Hagan*, 3 How. 212.

Congress specified all reservations, conditions and limitations that it intended should attach to lands in California. The debates in Congress upon the Bill for admitting California into the Union show the extreme care Congress gave to all phases of the Act of Admission and of the property rights involved, as we have shown in the main Brief of the State (pp. 95-99). The doctrine of *expressio unius* is properly applicable to this problem and leads to the inescapable conclusion that there was no intention on the part of Congress to attempt to reserve, by implication, the minerals in lands beneath navigable waters within the boundaries of California.

II.

Equality.

Under Point B of the Brief of Amicus Curiae (pp. 4-8) there is a composite argument concerning the meaning of the "equal footing" clause of the Act of Admission of the State of California; a quotation from *Moore* v. *Smaw;* and a citation to an Act of Congress of March 3, 1851 and several other statutes; from which counsel draw the conclusion that title to the submerged lands in question did not vest in the State of California.

This argument of Amicus Curiae is somewhat parallel to the attack made by counsel for plaintiff in its Brief (pp. 143-153) upon the established doctrine of this Court that the Constitutional rule of equality results in the vesting in new States of the title to all lands beneath navigable waters within the boundaries of each new State. (State's Brief, pp. 80-88). However, Amicus Curiae Jordan adds the thought of a "geographical" inequality as to new land-locked States; quotes from *Moore* v. *Smaw;* and refers to the Act of March 3, 1851 and several other statutes. Only this additional suggestion of Amicus Curiae and his references to *Moore* v. *Smaw* and these Acts need be considered herein, as the balance of his argument on this

proposition is fully disposed of in our main Brief (pp. 80-88).

Obviously the Constitutional doctrine of equality of States, requiring that new States automatically attain ownership of the beds of all navigable waters within their boundaries, does not require any *geographical* equality. It does not require that each new State have the same total acreage that the original States obtained. It does not require, for example, that Iowa be the same size as New York. Neither does it require that each new State have the same topography as the original States. Neither does it call for the new State, such as Oregon, to own coal in Pennsylvania nor for Pennsylvania to own oil in Wyoming. Likewise, it does not require that Missouri own a portion of the marginal sea belonging to Massachusetts or any of the other original States.

But the doctrine of Constitutional equality of States does require that the new States acquire the same incidents of sovereignty and government as inhere in the original thirteen States on the basis of this principle. This Court has consistently held that, by reason of this principle, the new States acquire, automatically upon their admission, the ownership of the beds of all navigable waters within their boundaries since the original States owned those lands in a special governmental capacity by virtue of their sovereignty, subject to the trust in furtherance of commerce, navigation and fishery. Whatever lands underneath navigable waters are found within the new State,—whether under rivers, Great Lakes, bays, harbors or the marginal sea—thus vest in the new State. This rule was first adopted in *Pollard* v. *Hagan*, 3 How. 212, in 1845, and has been reaffirmed by this Court in not less than 43 separate decisions from 1845 to 1938. It is a firmly embedded rule of property.

(a) *Moore* v. *Smaw.*

Amicus Curiae cites *Moore* v. *Smaw*, 17 Cal. 199, 79 Am. Dec. 123,[8] to the proposition that there is a distinction between political and sovereign authority of a State; and that the ownership of minerals, gold and silver, is in no way essential thereto.

It should, however, be pointed out that *Moore* v. *Smaw* dealt only with the question of ownership of mineral rights in lands contained within a Mexican grant of the Mariposa Ranch to John Fremont which was confirmed by a United States patent under the Act of March 3, 1851. The Mariposa grant, lies within several miles of Yosemite Valley, more than 150 miles distant from the coast, and in no way involved lands beneath any navigable waters, either on the open coast or otherwise.

The Court in the Moore case first overruled an earlier California case of *Hicks* v. *Bell*, 3 Cal. 219,[9] and held that the State of California did not become vested with the minerals under the public uplands of the United States by reason of its admission into the Union, as the Hicks case had formerly determined. The Court then, in the *Moore* case, adjudicated that the Fremont patent of the Mariposa Ranch vested the fee simple, including all minerals, in Fremont, regardless of what mineral rights a Mexican grantee received by a Mexican grant under the laws of Mexico. It is thus seen that *Moore* v. *Smaw*, rather than supporting the proposition of Amicus Curiae, is against that proposition in its adjudication that the minerals did pass to the patentee in confirmation of a Mexican grant.

Furthermore, Justice Field, in the *Moore* case, expressly recognized that the United States held certain rights of

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[8] Cited by Amicus Curiae as *Moore* v. *Shaw*.

[9] Counsel for Amicus Curiae cites *Hicks* v. *Bell*, *supra*, as authority (Brief p. 7) without apparently realizing that *Hicks* v. *Bell* was in 1861, overruled by the California Supreme Court in *Moore* v. *Smaw*, *supra*.

sovereignty—title to land beneath navigable waters—only in trust for the future State, which rights at once vested in the State upon her admission into the Union.[10]

(b). *Act of March 3, 1851.*

Counsel for Amicus Curiae cites the Act of March 3, 1851 and refers to the provision that after all Mexican and Spanish claims to lands within the boundaries of California were determined, all land "shall be deemed, held and considered as part of the public domain of the United States." (Brief, p. 7)

It need only be observed that this Act of March 3, 1851 was "An Act to ascertain and settle the private land claims in the State of California"; that it set up a Commission and required all persons in California claiming lands by virtue of any title derived from the Spanish or Mexican Governments to present the same within the time designated, as well as for the further proceedings to determine these claims, and for patents to be issued in confirmation of valid claims. The Act, in Section 13, then provided that all lands, claims to which were finally rejected by the Commissioners, and all lands, the claims to which shall not have been presented to the Commissioners within two years after the date of the Act, shall be deemed a part of the public domain of the United States.

It is obvious that this Act to settle private land claims was not intended to and did not affect in any way the ownership by the State of the lands beneath navigable waters within the State's boundaries. The eight or so decisions of this Court affirming the title of the State of California to lands beneath navigable waters more than demonstrate the truth of this proposition. (*Borax Consoli-*

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[10] "It is undoubtedly true that the United States held certain rights of sovereignty over the territory which is now embraced within the limits of California, only in trust for the future state, and that such rights at once vested in the new state upon her admission into the Union." *Moore* v. *Smaw*, 17 Cal. 199, 79 Am. Dec. 123, at 131.

dated v. *Los Angeles* (1935) 296 U. S. 10, 15; *United States* v. *Mission Rock Co.* (1903) 189 U. S. 391, 392; *United States* v. *Coronado Beach Co.* (1921) 255 U. S. 472, 483; *United States* v. *O'Donnell* (1938) 303 U. S. 501, 519; *Knight* v. *United States Land Association* (1891) 142 U. S. 161, 183; *San Francisco* v. *Le Roy* (1891) 138 U. S. 656, 670-71; *Weber* v. *Harbor Commissioners* (1873) 18 Wall 57, 66; and *Mumford* v. *Wardwell* (1867) 6 Wall 423, 436.)

(c) *Other Acts of Congress Cited by Amicus Curiae.*

Amicus Curiae cites (Br. p. 14-15) an Act of Congress of July 22, 1854 (10 Stat. p. 308, Sec. 4) to the proposition that:

> "When Congress created the office of Surveyor General to determine the claims of Mexicans and Spaniards to lands in California, minerals were expressly excluded by Congressional legislation, 10 Stat. L. 308, Section 4".

Counsel for Amicus Curiae have completely misread this 1854 statute. *It has nothing to do with claims in California* or with the proposition to which it is cited. It deals exclusively with the establishment of a Surveyor General's office in the Territories of New Mexico, Kansas and Nebraska; with the ascertainment of the validity of Spanish and Mexican land grants in the Territory of New Mexico *alone;* with the donation of quarter sections of land to male residents of the Territory of New Mexico; and in connection with such donations in the Territory of New Mexico, Section 4 of the Act, (cited by Amicus Curiae) provides

> "that none of the provisions of this Act shall extend to mineral or school lands, salines, military or other reservations", etc.

Obviously this has nothing whatever to do with California or with the reservation of minerals in Mexican or Spanish land grants in California, to which proposition the statute is cited by Amicus Curiae.

The Acts of March 31, 1853 and July 25, 1866 (cited by Amicus Curiae in the Brief, p. 15) are reviewed herein in connection with the cases cited by Amicus Curiae involving these two Acts.[11]

CONCLUSION.

It may fairly be said that after a review of each decision and statute cited by Amicus Curiae, it is found that none of them support the propositions asserted by counsel and to which these authorities are supposed to relate. In fact, we are rather puzzled by the citations of Amicus Curiae as we find upon examination that they simply have nothing in common with the argument of counsel to which they are referred as authority.

Respectfully submitted,

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[11] See footnote 5, *supra*.